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Attorneys for Plaintiff
GEMCAP LENDING I, LLC

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

GEMCAP LENDING I, LLC, a
Delaware limited liability company,

Plaintiff,

vs.

ARGUS CAPITAL FUNDING, LLC, a
New York limited liability company;
ACH CAPITAL, LLC, a Delaware
limited liability company; and DOES 1
through 100, inclusive,

Defendants.

Case No. 2:17-cv-1327

**PLAINTIFF GEMCAP LENDING I,
LLC'S COMPLAINT FOR:**

1. **INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS;**
 2. **INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS;**
 3. **NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS;**
 4. **VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT, 15 U.S.C. § 1692;**
 5. **VIOLATIONS OF THE ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT, CIVIL CODE § 1788, ET SEQ.;**
 6. **UNFAIR COMPETITION IN VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17200, ET SEQ.**
 7. **RESTITUTION TO AVOID UNJUST ENRICHMENT; AND**
 8. **DECLARATORY RELIEF**
- DEMAND FOR JURY TRIAL**

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1 Plaintiff GemCap Lending I, LLC (hereinafter, “Plaintiff” or “GemCap”)
 2 complains of defendants and alleges as follows:

3 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

4 **THE PARTIES**

5 1. Plaintiff is and at all times mentioned and/or relevant herein was a
 6 Delaware limited liability company with its principal place of business in Malibu,
 7 California.

8 2. Plaintiff is informed and believes and thereupon alleges that Defendant
 9 Argus Capital Funding, LLC (hereinafter, “Argus”) is and at all times mentioned
 10 and/or relevant herein was a New York limited liability company with its principal
 11 place of business located in New York, New York.

12 3. Plaintiff is informed and believes and thereupon alleges that Defendant
 13 ACH Capital, LLC (hereinafter, “ACH”) is and at all times mentioned and/or relevant
 14 herein was a Delaware limited liability company with its principal place of business
 15 located in New York, New York.

16 4. For purposes of this Complaint, Argus and ACH will be referred to
 17 collectively herein as the “Defendants”.

18 5. Plaintiff is ignorant of the true names and capacities of the defendants
 19 sued herein as DOES 1 through 100, inclusive, and therefore sues said defendants by
 20 said fictitious names. Plaintiff will amend this Complaint to allege their true names
 21 and capacities when ascertained.

22 6. Plaintiff is informed and believes and thereupon alleges that at all times
 23 relevant herein, each of the DOE defendants, and each of the named defendants, were
 24 the agents and/or employees of one or more of the other defendants, were acting
 25 within the course and scope of said agency and/or employment, and that each
 26 defendant has aided and assisted one or more of the other defendants in committing
 27 the wrongful acts alleged herein.

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1 11. Once a loan is approved, GemCap typically funds subject to a
 2 specified limit and a structure under which the borrower must demonstrate that its
 3 asset base and liquidity warrant continued lending. In the event of a default by a
 4 borrower, GemCap pursues its rights against the pledged security or, when
 5 necessary, initiates litigation.

6 GemCap's Loan and Security Agreement with Surface Source USA NC, Inc.

7 12. On or about February 26, 2016, GemCap, as lender, and Surface
 8 Source USA NC, Inc. ("Surface Source"), as borrower, entered into a Loan and
 9 Security Agreement ("Loan and Security Agreement") and other related agreements.
 10 Essentially, pursuant to the Loan and Security Agreement, GemCap agreed to
 11 extend a loan credit facility to Surface Source on the terms and conditions set forth
 12 in that Agreement. A true and correct copy of the Loan and Security Agreement is
 13 attached hereto as **Exhibit "A"** and incorporated herein by reference.

14 13. As collateral for the loan credit facility, the Loan and Security
 15 Agreement provides that Surface Source would convey a first priority security
 16 interest in and lien upon Surface Source's assets, including but not limited to its
 17 equipment, contracts, proceeds from any assets, accounts, deposit accounts,
 18 intellectual property, goods, cash monies, etc. The Loan and Security Agreement
 19 further provides that such collateral must not be disposed and must be kept free and
 20 clear of any liens.

21 GemCap's UCC Financing Statement

22 14. On or about February 25, 2016, GemCap filed a UCC Financing
 23 Statement (hereinafter, the "GemCap UCC Financing Statement") upon *all* of
 24 Surface Source's assets (whether tangible or intangible). A true and correct copy of
 25 the GemCap's UCC Financing Statement is attached hereto as **Exhibit "B"** and
 26 incorporated herein by reference.

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Argus and ACH

15. GemCap is informed and believes and on that basis alleges that on or about January 6, 2017, Argus entered into a “Merchant Agreement” (hereinafter, “Merchant Agreement”) with Surface Source, whereby Surface Source allegedly assigned and transferred to Argus a certain percentage of Surface Source’s future receivables.

16. GemCap is further informed and believes and on that basis alleges that on or about February 6, 2017, Argus (through its servicing agent ACH), filed a UCC Financing Statement (hereinafter, “Defendants’ UCC Financing Statement”) upon Surface Source’s assets. Upon information and belief, a true and correct copy of Defendants’ UCC Financing Statement is attached hereto as **Exhibit “C”** and incorporated herein by reference.

17. Remarkably, despite knowing of GemCap’s secured priority rights in Surface Source’s assets, on or about February 7, 2017 Defendants sent GemCap a letter demanding that *GemCap* make payments to *Defendants* because of Surface Source’s alleged default on the alleged Merchant Agreement; GemCap first received the letter on February 13, 2017. A true and correct copy of Defendants’ demand letter to GemCap is attached hereto as **Exhibit “D”** and incorporated herein by reference.

18. Immediately on February 13, 2017 and again on February 14, 2017, GemCap’s attorneys sent letters to Defendants demanding that Defendants cease and desist their unlawful debt collection practices. Defendants ignored those letters and continued to engage in their tortious conduct. A true and correct copy of GemCap’s attorney’s February 13, 2017 and February 14, 2017 letters directed to Defendants are attached collectively hereto as **Exhibit “E”** and incorporated herein by reference.

19. GemCap has since learned and on information and belief alleges that Defendants, after receiving the letters from GemCap’s attorney, have continued to send demand letters to other entities, including to Surface Source’s customers, in

1 order to extract some form of payment from parties with which Defendants have no
 2 privity and in total disregard of GemCap's prior secured rights. A true and correct
 3 copy of a sampling of Defendants' demand letters are attached collectively hereto as
 4 **Exhibit "F"** and incorporated herein by reference.

5 20. In addition to the demand letters, GemCap is informed and believes and
 6 on that basis alleges that Defendants sent or caused to be sent certain text message
 7 communications whereby Defendants threatened to publicly embarrass Surface
 8 Source, file criminal charges, disparage Surface Source on various online and
 9 newspaper print forums, and expose Surface Source for being a "thief". In those
 10 same text messages, Defendants acknowledge the existence of "other lenders". A
 11 true and correct copy of these text messages are attached collectively hereto as
 12 **Exhibit "G"** and incorporated herein by reference.

13 **FIRST CAUSE OF ACTION**
 14 **FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL**
 15 **RELATIONS**
 16 **(AGAINST ALL DEFENDANTS)**

17 21. Plaintiff incorporates by this reference the allegations in paragraphs 1
 18 through 20, above.

19 22. As set forth hereinabove, Plaintiff and Surface Source entered into a
 20 contractual relationship by which GemCap, as a priority secured lender, retained
 21 certain rights and interests in and to Surface Source's assets.

22 23. GemCap is informed and believes and thereon alleges that Defendants
 23 had knowledge of the Loan and Security Agreement and/or GemCap's UCC
 24 Financing Statement and also had the intent to interfere with GemCap's relationship
 25 with Surface Source. Indeed, by sending demand letters to GemCap and Surface
 26 Source's customers seeking to extract some sort of payment (and thereby diminishing
 27 Surface Source's reputation, which directly affects GemCap's ability to collect on its
 28 loan), Defendants each took specific action to interfere with the Loan and Security

1 Agreement and GemCap's UCC Financing Statement, to further each of their own
2 special interests.

3 24. As a direct and proximate result of all Defendants' interference with
4 Plaintiff's contractual relations, Plaintiff has incurred damages plus interest, costs,
5 attorney's fees, and expenses, and will continue to incur damages in an amount to be
6 proven at trial, in addition to incidental and consequential damages and attorneys'
7 fees and costs. As of the filing of this action, the total amount of compensatory
8 damages to Plaintiff is over \$2,000,000, plus attorneys' fees, costs and expenses.

9 25. Defendants' conduct in interfering with Plaintiff's contractual relations
10 as alleged herein was willful, wanton, malicious, and oppressive and in conscious
11 disregard of Plaintiff's rights, justifying an award of exemplary and punitive damages.

12 **SECOND CAUSE OF ACTION**
13 **FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC**
14 **RELATIONS**
15 **(AGAINST ALL DEFENDANTS)**

16 26. Plaintiff incorporates by this reference the allegations in paragraphs 1
17 through 25, above.

18 27. As set forth hereinabove, Plaintiff and Surface Source entered into a
19 contractual relationship by which GemCap, as a priority secured lender, retained
20 certain rights and interests in and to Surface Source's assets, and to which GemCap
21 had certain expectations of prospective economic benefits.

22 28. GemCap is informed and believes and thereon alleges that Defendants
23 had knowledge of the Loan and Security Agreement and/or GemCap's UCC
24 Financing Statement and also had the intent to interfere with GemCap's relationship
25 with Surface Source. Indeed, by sending demand letters to GemCap and Surface
26 Source's customers seeking to extract some sort of payment (and thereby diminishing
27 Surface Source's reputation, which directly affects GemCap's ability to collect on its
28 loan), Defendants each took specific action to interfere with the Loan and Security

1 Agreement and GemCap's UCC Financing Statement, to further each of their own
2 special interests.

3 29. As a direct and proximate result of all Defendants' interference with
4 Plaintiff's contractual relations, Plaintiff has incurred damages plus interest, costs,
5 attorney's fees, and expenses, and will continue to incur damages in an amount to be
6 proven at trial, in addition to incidental and consequential damages and attorneys'
7 fees and costs. As of the filing of this action, the total amount of compensatory
8 damages to Plaintiff is over \$2,000,000, plus attorneys' fees, costs and expenses.

9 30. Defendants' conduct in interfering with Plaintiff's contractual relations
10 as alleged herein was willful, wanton, malicious, and oppressive and in conscious
11 disregard of Plaintiff's rights, justifying an award of exemplary and punitive
12 damages.

13 **THIRD CAUSE OF ACTION**
14 **FOR NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC**
15 **RELATIONS**
16 **(AGAINST ALL DEFENDANTS)**

17 31. Plaintiff incorporates by this reference the allegations in paragraphs 1
18 through 30, above.

19 32. As set forth hereinabove, Plaintiff and Surface Source entered into a
20 contractual relationship by which GemCap, as a priority secured lender, retained
21 certain rights and interests in and to Surface Source's assets, and to which GemCap
22 had certain expectations of prospective economic benefits.

23 33. GemCap is informed and believes and thereon alleges that Defendants
24 had knowledge of the Loan and Security Agreement and/or GemCap's UCC
25 Financing Statement and also had the intent to interfere with GemCap's relationship
26 with Surface Source. Indeed, by sending demand letters to GemCap and Surface
27 Source's customers seeking to extract some sort of payment (and thereby diminishing
28 Surface Source's reputation, which directly affects GemCap's ability to collect on its

loan), Defendants each took specific action to negligently interfere with the Loan and Security Agreement and GemCap's UCC Financing Statement, to further each of their own special interests.

34. As a direct and proximate result of all Defendants' interference with Plaintiff's contractual relations, Plaintiff has incurred damages plus interest, costs, attorney's fees, and expenses, and will continue to incur damages in an amount to be proven at trial, in addition to incidental and consequential damages and attorneys' fees and costs. As of the filing of this action, the total amount of compensatory damages to Plaintiff is over \$2,000,000, plus attorneys' fees, costs and expenses.

35. Defendants' conduct in interfering with Plaintiff's contractual relations as alleged herein was willful, wanton, malicious, and oppressive and in conscious disregard of Plaintiff's rights, justifying an award of exemplary and punitive damages.

FOURTH CAUSE OF ACTION
FOR VIOLATIONS OF THE FEDERAL DEBT COLLECTION PRACTICES
ACT ("FDCPA"), 15 U.S.C. § 1692
(AGAINST ALL DEFENDANTS)

36. Plaintiff incorporates by this reference the allegations in paragraphs 1 through 35, above.

37. Plaintiff is informed and believes and thereupon alleges that Defendants are and at all times relevant herein were "creditors" and/or "debt collectors" within the meaning of the FDCPA, 15 U.S.C. § 1692a(6).

38. Defendants, by knowingly and willfully taking action and/or authorizing action to be taken that was and continues to be inconsistent with the provisions of the FDCPA, violated and continue to violate the FDCPA with regard to the attempts to recover the alleged debt they believe they are owed. Those actions include, but are not limited to: (a) threatening to, attempting to, and engaging in other conduct designed to collect a debt against Plaintiff and others

1 without lawful cause; (b) threatening to or attempting to irrevocably appoint
2 themselves as Surface Source's agent or attorney-in-fact "with full authority to take
3 any action or execute any instrument or documents and to settle all obligations"
4 without lawful cause; (c) failing to communicate with Plaintiff's attorney while at
5 the same time continuing to send demand letters to third parties with regard to the
6 alleged debt; (d) concealing material facts, such as GemCap's priority secured
7 interest in and to Surface Source's assets when communicating with third parties; (e)
8 sending threatening and unlawful text message communications; and (f) continuing
9 to take action in total disregard of the law with regard to collecting on the alleged
10 debt against GemCap's and GemCap's interests after GemCap notified Defendants
11 that Defendants' alleged lien is junior and subordinate to GemCap's.

12 39. As a proximate result of the foregoing conduct, Plaintiff has been
13 damaged and is entitled to an award of all actual damages as well as statutory
14 damages as provided by law. Plaintiff is also entitled to an award of costs and
15 attorneys' fees as provided by law. Plaintiff is also entitled to injunctive relief
16 prohibiting Defendants from continuing to take any further actions and/or
17 employing any unlawful conduct, methods, acts, or practices in violation of the
18 FDCPA.

19 **FIFTH CAUSE OF ACTION**
20 **VIOLATIONS OF THE ROSENTHAL FAIR DEBT COLLECTION**
21 **PRACTICES ACT ("RFDCPA"), CIVIL CODE §§ 1788, ET SEQ.**
22 **(AGAINST ALL DEFENDANTS)**

23 40. Plaintiff incorporates by this reference the allegations in paragraphs 1
24 through 39, above.

25 41. Plaintiff is informed and believes and thereupon alleges that
26 Defendants are and at all times relevant herein were "creditors" and/or "debt
27 collectors" within the meaning of the RFDCPA, Civil Code § 1788.2.

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1 42. Defendants, by knowingly and willfully taking action and/or
2 authorizing action to be taken that was and continues to be inconsistent with the
3 provisions of the RFDCPA, violated and continue to violate the RFDCPA with
4 regard to the attempts to recover the alleged debt they believe they are owed. Those
5 actions include, but are not limited to: (a) threatening to, attempting to, and
6 engaging in other conduct designed to collect a debt against Plaintiff and others
7 without lawful cause; (b) threatening to or attempting to irrevocably appoint
8 themselves as Surface Source's agent or attorney-in-fact "with full authority to take
9 any action or execute any instrument or documents and to settle all obligations"
10 without lawful cause; (c) failing to communicate with Plaintiff's attorney while at
11 the same time continuing to send demand letters to third parties with regard to the
12 alleged debt; (d) concealing material facts, such as GemCap's priority secured
13 interest in and to Surface Source's assets when communicating with third parties; (e)
14 sending threatening and unlawful text message communications; and (f) continuing
15 to take action in total disregard of the law with regard to collecting on the alleged
16 debt against GemCap's and GemCap's interests after GemCap notified Defendants
17 that Defendants' alleged lien is junior and subordinate to GemCap's.

18 43. As a proximate result of the foregoing conduct, Plaintiff has been
19 damaged and is entitled to an award of all actual damages as well as statutory
20 damages as provided by law. Plaintiff is also entitled to an award of costs and
21 attorneys' fees as provided by law. Plaintiff is also entitled to injunctive relief
22 prohibiting Defendants from continuing to take any further actions and/or employing
23 any unlawful conduct, methods, acts, or practices in violation of the RFDCPA.

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SIXTH CAUSE OF ACTION
FOR UNFAIR COMPETITION IN VIOLATION OF CALIFORNIA
BUSINESS & PROFESSIONS CODE §§ 17200, ET SEQ.
(AGAINST ALL DEFENDANTS)

44. Plaintiff incorporates by this reference the allegations in paragraphs 1 through 43, above.

45. The actions of all Defendants as alleged hereinabove were unfair, unlawful, and fraudulent business acts and/or practices, thereby constituting unfair competition under California Business & Professions Code §§ 17200, *et seq.* Plaintiff is therefore entitled to full restitution and/or disgorgement by all Defendants of all revenues, earnings, profits or other economic benefits that they have derived from their unfair, unlawful, and fraudulent business acts or practices with regard to Plaintiff. Plaintiff is also entitled to temporary restraining order, preliminary and permanent injunctive relief as a result of Defendants' violations of the Unfair Competition Law.

46. Defendants' conduct in engaging in unfair competition as alleged herein was willful, wanton, malicious, and oppressive and in conscious disregard of Plaintiff's rights, justifying an award of exemplary and punitive damages.

SEVENTH CAUSE OF ACTION
FOR RESTITUTION TO AVOID UNJUST ENRICHMENT
(AGAINST ALL DEFENDANTS)

47. Plaintiff incorporates by this reference the allegations in paragraphs 1 through 46, above.

48. Plaintiff is informed and believes and thereon alleges that the actions of all Defendants as alleged hereinabove caused Defendants to benefit economically from those actions.

49. Under the circumstances, it would be inequitable for Defendants to retain and reap the economic benefits of their actions. Plaintiff is therefore entitled

1 to full restitution and/or disgorgement by Defendants of all revenues, earnings,
2 profits or other economic benefits earned at Plaintiff's detriment and expense.
3 Otherwise, Defendants would be unjustly enriched.

4 **EIGHTH CAUSE OF ACTION**
5 **FOR DECLARATORY RELIEF**
6 **(AGAINST ALL DEFENDANTS)**

7 50. Plaintiff incorporates by this reference the allegations in paragraphs 1
8 through 49, above.

9 51. Based on the above allegations, an actual controversy exists between
10 Plaintiff and Defendants concerning Plaintiff's respective security interests and
11 rights in connection with Surface Source.

12 52. Accordingly, Plaintiff desire a judicial determination of its rights and
13 duties and a declaration that:

- 14 Plaintiff possesses a first priority security interest in and lien upon Surface Source's
15 assets, including its equipment, contracts, proceeds from any assets, accounts,
16 deposit accounts, and cash monies, superior to all Defendants' purported claims to
17 such assets; and
- 18 Defendants' UCC Financing Statement is junior to GemCap's UCC Financing
19 Statements.

20 53. A judicial declaration is necessary and appropriate at this time under
21 the circumstances in order for Plaintiff to ascertain its rights and duties vis-à-vis
22 Defendants. Otherwise, Plaintiff will continue to suffer damages as a result of the
23 unsettled state of affairs.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff prays for judgment against all defendants, and each of
26 them, as follows:

- 27 1. For damages according to proof, plus applicable interest, costs, and
28 expenses;

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- 1 2. For restitution according to proof, plus applicable interest, costs, and
- 2 expenses;
- 3 3. For a constructive trust;
- 4 4. For punitive damages;
- 5 5. For a temporary restraining order, preliminary and permanent
- 6 injunctive relief;
- 7 6. For attachment of assets;
- 8 7. For relief under the FDCPA and RFDCPA;
- 9 8. For declaratory relief;
- 10 9. For Plaintiff's attorneys' fees;
- 11 10. For Plaintiff's costs, including costs of collection and costs of suit
- 12 herein;
- 13 11. For pre-judgment interest;
- 14 12. For post-judgment interest; and
- 15 13. For such other and further relief that the Court deems just and proper.
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17 DATED: February 17, 2017

FREEMAN, FREEMAN & SMILEY, LLP

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By: /s/ Matthew A. Young

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TODD M. LANDER

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ARASH BERAL

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MATTHEW A. YOUNG

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Attorneys for Plaintiff

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GEMCAP LENDING I, LLC

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